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No. 02-1674

IN THE
# Supreme Court of the United States
OCTOBER TERM, 2002

MITCH MCCONNELL *et al.*,

*Appellants,*

v.

FEDERAL ELECTION COMMISSION *et al.*,

*Appellees.*

**On Appeal From The United States District Court For The District of Columbia**

## REPLY BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION | 1 |
| ARGUMENT | 2 |
| CONCLUSION | 6 |

## TABLE OF AUTHORITIES

Page

**CASES**

*Abbott Labs. v. Gardner*,
387 U.S. 136 (1967) ..... 5

*Colorado Republican Fed. Campaign Comm. v. FEC*,
518 U.S. 604 (1996) ..... 5

*FEC v. Christian Coalition*,
52 F. Supp. 2d 45 (D.D.C. 1999) ..... 4

*Thomas v. Collins*,
323 U.S. 516 (1945) ..... 3

*United States v. Locke*,
471 U.S. 84 (1985) ..... 3

**STATUTES**

Bipartisan Campaign Reform Act of 2002,
Pub. L. No. 107-155, 116 Stat. 81 ..... *passim*

11 C.F.R. § 109.10 ..... 2

68 Fed. Reg. 421 (2003) ..... 2

S. Ct. R. 18.6 ..... 1

## INTRODUCTION

Consistent with the congressional mandate that the appeals in the campaign finance litigation be "advance[d] on the docket and expedite[d] to the greatest possible extent," BCRA § 403(a)(4), appellants filed their jurisdictional statement within hours of the decision below. Appellants did so because they believed that this Court should note probable jurisdiction on all of the questions presented in an expedited manner, thereby leaving the Court as much time as possible to consider the case on the merits. The Executive Branch appellees share this view, having urged this Court to note probable jurisdiction on all of the questions presented "[i]n order to facilitate expeditious resolution of this case in accordance with the statutory mandate," Executive Branch Resp. 7, and having further proposed that this Court note probable jurisdiction on an expedited basis, *see* Mot. of Executive Branch Defendants for Expedited Briefing Schedule 2.

The Intervenor appellees, however, have taken a dramatically different approach. While agreeing on the one hand that this Court should note probable jurisdiction within a matter of days, *see id.* at 1, they suggest on the other, in a voluminous and at times belligerent filing, that this Court should "summarily dispose of appellants' challenges" to certain statutory provisions, Intervenors Resp. 13. Leaving aside the curious fact that the intervenors repeatedly stop short of asking this Court to *affirm* the district court's decision as to those provisions — which is the appropriate course where a party believes that this Court should not set issues in an appeal for briefing and oral argument, *see* S. Ct. R. 18.6 — intervenors' attempt to put points on the board is both imprudent and unwise. Intervenors' arguments regarding the justiciability of appellants' challenges to certain provisions of BCRA go directly to the *merits* of the district court's rulings on those provisions — rulings on which the three members of the district court did not even agree. Those justiciability rulings themselves present substantial

questions of law, and this Court should await plenary briefing on those questions rather than attempting to resolve them at this abbreviated preliminary stage. The Court should thwart intervenors' scorched-earth litigation strategy, and note probable jurisdiction on all of the questions presented in this appeal.

## ARGUMENT

1. Intervenors first insinuate that this Court should refuse to note probable jurisdiction on appellants' challenge to section 212 of BCRA, which imposes disclosure requirements on persons who merely enter into a contract to make disbursements for independent expenditures, even before those outlays are actually made.[1] To be sure, the district court did conclude that appellants' challenges to section 212 were unripe in light of the FEC's implementing regulations, *see* Supplemental Appendix ("Supp. App.") 132sa-133sa, which seemingly construe section 212, contrary to the plain language of the statute, *not* to require advance disclosure, *see* 68 Fed. Reg. 421, 452-53 (2003) (to be codified at 11 C.F.R. § 109.10). One would never know from intervenors' response, however, that Judge Henderson dissented from that holding, and would have struck down section 212 in its entirety. She noted that section 212 would "in many instances * * * require reporting of expenditures not yet made."

[1] Intervenors suggest that appellants have "challenge[d]" the analogous "advance notice" requirement of BCRA § 201, which adds similar disclosure requirements with respect to disbursements for "electioneering communications." *See* Intervenors Resp. 3 n.2. Notwithstanding the references to that provision in the jurisdictional statement, *see* J.S. i, 14-15, it is clear that appellants prevailed as to that provision, and that appellants therefore do not seek to "appeal" from the district court's decision themselves. As intervenors note, *see* Intervenors Resp. 3 n.2, the government has appealed from the district court's decision on section 201, *see* Executive Branch J.S. 26-27, and appellants agree that this Court should note probable jurisdiction on that issue. And intervenors correctly note that appellants do not contest the district court's ruling that the "advance notice" provision of section 201 can be severed from the remainder of that section.



Supp. App. 381sa. She reasoned that this Court has long held that "advance reporting and registration requirements are 'quite incompatible with the requirements of the First Amendment.'" *Id.* at 383sa (quoting *Thomas v. Collins*, 323 U.S. 516, 540 (1945)). And she specifically rejected the defendants' reliance on the FEC's regulations, noting that it was a "dubious proposition" whether the FEC could read the "advance notice" requirement out of the statute altogether. *Id.* at 383sa n.154.[2]

The three-judge court plainly disagreed, therefore, as to whether a narrowing regulation always renders a challenge to a statutory provision unripe, even where, as here, the statutory provision unambiguously infringes on important First Amendment values and the saving construction proffered by the regulation "press[es] statutory construction to the point of disingenuous evasion." *United States v. Locke*, 471 U.S. 84, 96 (1985) (internal quotation omitted). In light of this substantial disagreement, the Court should note probable jurisdiction on appellants' challenge to section 212 of BCRA, and resolve that challenge only after full briefing and argument.

2. Intervenors next imply that this Court should refuse to note probable jurisdiction on appellants' challenges to the "coordination" provisions of BCRA. Those provisions, however, are some of the most important in BCRA, and appellants' challenges to those provisions are both justiciable and substantial.

a. As a threshold matter, intervenors suggest that any challenge to section 211 of BCRA, which defines "independent expenditure" as "an expenditure * * * that is not made in concert or cooperation with or at the request or suggestion of" a candidate or political party committee, has been waived. *See*

[2] Judge Henderson further noted that she would have struck down section 212 even if the provision could be narrowed to exclude advance disclosure, on the ground that the stringent deadlines for reporting even expenditures that were actually made were not narrowly tailored to a compelling governmental interest. *See* Supp. App. 383sa n.154.

Intervenors Resp. 5-6. That argument, however, is nothing more than a strawman. Appellants are plainly not challenging section 211, as counsel made clear before the district court. Tr. 342. To the extent that appellants cite section 211 at all in their jurisdictional statement, *see* J.S. i, 15, they do so only descriptively, because the definition of "independent expenditure" in section 211 — which closely tracks the preexisting definition of "independent expenditures" in FECA — provides the backdrop for the new, broader definition of "coordinated" expenditures in section 214.

b. The heart of appellants' challenge to BCRA's coordination provisions is their challenge to section 214. That section (in apparent contradiction to section 211) treats any expenditure made merely in *consultation* with a political party committee as coordinated, rather than independent, *see* BCRA § 214(a); repeals prior FEC regulations narrowly defining coordination, *see* BCRA § 214(b); and demands that the FEC promulgate new regulations that do "not require agreement or formal collaboration to establish coordination," *see* BCRA § 214(c).

The district court rejected plaintiffs' challenge to section 214 on the ground that an agreement is not constitutionally required as a predicate for a finding of coordination, *see* Supp. App. 138sa-143sa, and further rejected plaintiffs' challenge to section 214(c) on standing and ripeness grounds, *see id.* at 144sa-156sa. Intervenors suggest that these conclusions are so unimpeachable as not to warrant plenary review. Once again, however, intervenors virtually ignore Judge Henderson's dissenting opinion, which took issue with all of the majority's conclusions. Judge Henderson began by noting that this Court has never specifically defined what makes an expenditure "coordinated," and therefore subject to the limits applicable to contributions. *See id.* at 386sa. However, relying heavily on the key lower-court decision in the area, *see FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), she concluded that mere



*consultation* with a candidate or political party was insufficient to render an expenditure "coordinated" for constitutional purposes, *see* Supp. App. 385sa-392sa. As to section 214(c) more specifically, Judge Henderson agreed with appellants that *any* regulation that did not require "agreement or formal collaboration" to establish coordination would be invalid, noting this Court's command that "'simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one.'" *Id.* at 392sa-395sa (quoting *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 621-22 (1996) (plurality opinion) (*Colorado I*)). And she specifically rejected the majority's holding on justiciability, on the grounds that, under the test articulated in this Court's seminal case on pre-enforcement review, *no* FEC regulation could be promulgated that would pass constitutional muster, and the parties would suffer hardship absent immediate judicial review because of the risk that current activity could render future expenditures "coordinated." *See id.* at 395sa-396sa (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)).

The judges below reached different conclusions, therefore, not only as to the justiciability of appellants' challenges to one of BCRA's coordination provisions, but also as to the merits of appellants' First Amendment challenges to that provision and others. The Court should note probable jurisdiction on appellants' challenges to sections 202 and 214 of BCRA,[3] and await full briefing and argument before ruling on them.[4]

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[3] Section 202 applies the coordination provisions of BCRA to disbursements for electioneering communications. As intervenors themselves recognize, *see* Intervenors Resp. 5 n.5, appellants' challenge to section 202 rises or falls with appellants' other challenges.

[4] Inexplicably, given the ardor with which they argue that this Court should not consider other claims that the district court held to be nonjusticiable, intervenors do not suggest that this Court should refuse to note probable jurisdiction over appellants' challenge to section 305, which burdens the ability of federal candidates to refer to other candidates in their advertising.

## CONCLUSION

The Court should note probable jurisdiction on all of the questions presented, and set the case for briefing and oral argument.

Respectfully submitted,

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